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FILED
NOV 7 1947
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Supreme Court of the United States

No. 401—October Term, 1947

WILLIE MELMOTH BOMAR,

Petitioner,

against

ROWENA KEITH KEYES, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

November 3, 1947.

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162 Fed. 2d 136

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against

ROWENA KEITH KEYES, and THE CITY OF NEW YORK,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Facts

The petitioner was a probationary teacher of home economics in the Girls High School, Brooklyn, New York, a high school under the management and control of the Board of Education of the City of New York. During her probationary period her services were rated "unsatisfactory" and, after a hearing before the Board of Superintendents of the Board of Education, it was recommended that her services be discontinued. On October 31, 1939 the Board of Education accordingly dismissed her from the teaching service.

Petitioner appealed to the Commissioner of Education of the State of New York from the Board's action

in dismissing her. The Commissioner dismissed her appeal (R. 21) on the ground that the dismissal of a teacher during her probationary period is not subject to review. *Matter of Bomar,* 62 N. Y. State Dept. Reports 126 (1940). The Commissioner's decision was based upon New York Education Law, §872, subdivision 1, which provides for a probationary period for teachers not to exceed three years. The above statute then provides:

> "The service of a person appointed to any of such positions [probationary teacher] may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the Board of Education."

Thereafter, the petitioner instituted a proceeding in the Supreme Court of the State of New York, Albany County, for the purpose of reviewing the Commissioner's determination (R. 21). The Court, in a comprehensive opinion discussing the law and the facts, dismissed the petitioner's proceeding and held that a probationary teacher had no tenure in office and could be dismissed at any time during the probationary period, with or without reason. *Matter of Bomar* v. *Cole,* 177 N. Y. Misc. Reports 740 (New York Supreme Court, Albany Co., 1941).

The next step in the litigation was the institution of an action by the petitioner on October 31, 1945 in the United States District Court for the Southern District of New York against the City of New York and Rowena Keith Keyes, principal of the high school in which she had been serving as a probationary teacher. In that action, the petitioner alleged that her dismissal was brought about by reason of her absence from school for nineteen days while she was serving on a Federal jury; that her right to serve on a Federal jury was a privilege guaranteed by

the laws of the United States, and that accordingly, her dismissal was a violation of her civil rights.

Without filing an answer the defendants moved for summary judgment and for judgment dismissing the petitioner's complaint pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure (R. 17). United States District Judge Hulbert in an opinion (R. 32-37) granted the defendants' motion and ordered the complaint dismissed (R. 41-42).

The petitioner then appealed to the United States Circuit Court of Appeals for the Second Circuit and on May 16, 1947 that court reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with its opinion. *Bomar* v. *Keyes,* 162 Fed. (2d) 136 (1947). In the course of its opinion the Circuit Court of Appeals said (p. 139):

> "It is quite another question whether either of the defendants is in fact liable. The City of New York at least is not, for it had no part in the supposed wrong; and the complaint was properly dismissed as to it. The statute provides that 'the educational affairs of each city shall be under the general management and control of a board of education' (§865, New York Education Law, Consol. Laws, c. 16) and the Board is a corporate body which may be sued (§300, New York Education Law) and to which all claims must be presented (§868-b, New York Education Law). On the other hand, for the following reasons we cannot say upon the present scanty record that by no possibility can the plaintiff have a claim against Keyes (*Dioguardi* v. *Durning,* 2 Cir., 130 F. 2d 774)."

Although the Circuit Court of Appeals remanded this case for further proceedings in accordance with its opinion, no order has yet been entered in the District Court because the petitioner has obtained an order staying the

entry of any order, judgment or decree by the United States District Court for the Southern District of New York until such time as this Court has determined the status of the City of New York as a defendant in this action.

The petitioner now applies for a writ of certiorari.

Summary of Argument

The determination of the Circuit Court of Appeals clearly upholds the dismissal of the complaint as to the City of New York. If there is any lack of clarity in that determination it is not appropriate to ask this Court to clarify it. The complaint was properly dismissed as against the City of New York because the City of New York had no part in the supposed wrong.

POINT I

The determination of the Circuit Court of Appeals clearly upholds the dismissal of the complaint as to the City of New York. If there is any lack of clarity in that determination it is not appropriate to ask this Court to clarify it. The complaint was properly dismissed as against the City of New York because the City of New York had no part in the supposed wrong.

The petitioner asserts that the opinion of the Circuit Court of Appeals does not clearly indicate whether or not the complaint has been dismissed as against the City of New York. The petitioner advances this alleged lack of clarity as a reason for seeking a writ of certiorari. This procedure is obviously improper. The proper place for an

interpretation or clarification of the Circuit Court's opinion is in the Circuit Court of Appeals itself.

Moreover, the opinion by the Circuit Court of Appeals needs no clarification. The status of the City of New York as a proper defendant in this action was directly raised in the Court below and definitely disposed of by that Court. The Court said (162 Fed. 2nd 136 at p. 139):

> "It is quite another question whether either of the defendants is in fact liable. The City of New York at least is not, for it had no part in the supposed wrong; and the complaint was properly dismissed as to it."

Thus it definitely disposed of the status of the City of New York as a proper defendant in this action and definitely affirmed the dismissal of the complaint as to it.

Equally without foundation is the attack on the merits of the determination below. The Board of Education is not a department of the New York City government; it is an independent corporate body which may sue and be sued in its corporate name, New York State Education Law, §§300, 865; *Gunnison* v. *Board of Education*, 176 N. Y. 11 (1903); *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125 (1921); *Matter of Divisich* v. *Marshall*, 281 N. Y. 170 (1939). The employees of the Board of Education of the City of New York are not the employees of the City of New York. *Matter of Divisich* v. *Marshall, supra; Matter of Ragsdale* v. *Board of Education*, 282 N. Y. 323 (1940); *Matter of Miceli* v. *Board of Education*, 287 N. Y. 596 (1941). Since the employees of the Board of Education are not employees of the City, there can be no liability upon the part of the City by reason of any act of the defendant Keyes, who was the Principal of the Board of Education's high school in which the plaintiff was employed. If the plaintiff has any grievance by reason of an

alleged unlawful dismissal, the proper defendant in such an action is the Board of Education of the City of New York, the Board that dismissed her.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 3, 1947.

Respectfully submitted,

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W. BERNARD RICHLAND,
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